



# Republican Policy Committee

Don Nickles, Chairman Doug Badger, Staff Director 347 Russell Senate Office Building (202) 224-2946 July 17, 1995

## S. 343 — Comprehensive Regulatory Reform Act of 1995

### Dole/Johnston vs. Glenn/Chafee Substitute

#### *Summary*

Glenn/Chafee has similar cost-benefit and risk analysis requirements to the pending Dole/Johnston substitute, but, like the current and past Executive Orders, Glenn/Chafee does not provide meaningful requirements backed by judicial review to actually make the agencies pursue rational rules. Moreover, Dole/Johnston is not simply a cost-benefit bill, but also provides comprehensive reform of the Administrative Procedures Act, which has not been amended for half a century.

While there are superficial similarities, many important provisions in Dole/Johnston have been discarded, and virtually all the major provisions that remain have been weakened.

#### *Key Provisions Dropped by Glenn/Chafee:*

- **Decisional Criteria** Dole/Johnston requires agencies to select the most cost-beneficial options permitted by the underlying statute. Glenn/Chafee contains no decisional criteria provision. While Glenn/Chafee contains no such requirement to use the cost-benefit information to improve decisionmaking. Further, Glenn/Chafee contains no guidance that less cost-effective alternatives may be selected if there are none available benefits to health, safety, or the environment;
- **Petition Process** Dole/Johnston provides for any petition from interested parties seeking to add existing regulations to the review schedule. Glenn/Chafee does not provide for any such review.
- **Petition for Alternative Method of Compliance;**
- **Petition to Revoke Review of a Major Free-Standing Risk Assessment;**
- **Delaney Clause Reform;**

- **Toxic Release Inventory Petition for Review;**
- **Scope of Review of Findings of Fact;**
- **Agency Consent Decree Abuse Curtailment;**
- **Affirmative Defense for Persons Reasonably Relying on Official Statements of Agency Policy.**

### ***Key Provisions Severely Weakened by Glenn/Chafee***

- **Major Rules Covered by the Act.** Glenn/Chafee, like Dole/Johnston covers rules of \$100 million or more. However, unlike Dole/Johnston, the Glenn/Chafee substitute:

- fails to cover rules that have a significant economic impact on a substantial number of small business or local governmental entities;
- does not cover agency statements of general applicability that act like rules, which will allow agencies to continue to issue rules under other names, without public notice and comment as well as cost-benefit and risk assessment;
- does not exempt regulations pursuant to international trade laws, customs tariffs, relating to the public debt, Federal Energy Regulatory Commission certification, or securities and commodities; but Glenn/Chafee **does** exempt the FEC and FCC; and
- does not allow judicial review of what OMB designates as a "major rule." What agencies determine to be a "major rule" is reviewable on a "clear and convincing" showing that the agency erred, and may be reviewed only after the final rule is issued. Dole/Johnston permits review of both OMB and agency designations, at both the proposed rule and the final rule stages, using an "arbitrary and capricious" standard.

- **Judicial Review.** Glenn/Chafee does not permit meaningful judicial review of agency cost-benefit and risk assessment analyses. Both Dole/Johnston and the version reported unanimously from the Committee on Governmental Affairs (S. 291) permit review of the agency analyses as part of the overall record after a final rule has been issued, and the analyses are material to whether the agency acted in an arbitrary or capricious manner. Glenn/Chafee does not require the court to place any special significance on the agency analyses, thus reducing the importance of the analyses to a level potentially no greater than any other document submitted to or prepared for the agency record, such as comments from parties.

- **Risk Assessments.** Glenn/Chafee imposes risk assessment requirements only on 11 departments and agencies. Glenn/Chafee allows even these agencies to avoid peer review of risk assessments in accordance with this Act merely by obtaining the

concurrence of OIRA. Conflict of interest provisions for peer review contractors are the same in both bills.

- **Agency Review of Existing Regulations.** Agency review is similar, except Glenn/Chafee does not allow the review of agency interpretive rules or policy guidances; and judicial review is limited to only whether the agency developed a review schedule or not — not which rules the agency places on that schedule. Dole/Johnston subjects agencies to an "arbitrary and capricious" judicial review for which rules are placed on the schedule for review (but not for the agency's timetable for the reviews). Both versions contain similar language authorizing appropriations committees to change the agency schedules. Glenn/Chafee requires a full rulemaking to repeal a rule on the schedule, while Dole/Johnston allows repeal of a rule that is within the agency's statutory authority to repeal to be effective automatically after the deadline on the schedule is passed.

- **Regulatory Flexibility Act Amendments.** Glenn/Chafee significantly weakens the Regulatory Flexibility Act amendments in Dole/Johnston. Accordingly, Glenn/Chafee will be strenuously opposed by small business. Although containing some judicial review of agency conformance with the Regulatory Flexibility Act, Glenn/Chafee does not permit judicial review of an agency's failure to prepare a regulatory flexibility analysis. Further, it makes it more difficult for small businesses to obtain judicial review of Regulatory Flexibility analyses that *are* prepared because Glenn/Chafee imposes a higher standard of review than does Dole/Johnston. Moreover, Glenn/Chafee does not contain any requirement that agencies seek rules that minimize economic impact on small businesses and local governmental entities.

- **Congressional Review of Agency Rules.** Glenn/Chafee allows Congress to review only "major" rules (with certain exceptions), not **all** rules (with certain exceptions) as in S. 219, which passed the Senate by a vote of 100 to 0, and was included in Dole/Johnston. Glenn/Chafee has retained the 45-day disapproval period in S. 219, while Dole/Johnston has provided Congress with a 60-day review period.

- **Postponement of Deadlines.** Glenn/Chafee postpones for only up to six months statutory and court-ordered deadlines that occur during the two-year period following date of enactment. Dole/Johnston postpones for up to two years both statutory and court-imposed deadlines occurring during the five-year period following enactment.

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